

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:BRK:TL-N-3706-99
RDCamacho

date:

to: Chief, Examination Division, Brooklyn District
Attn: Bob Blumenfeld, Team Coordinator

from: District Counsel, Brooklyn

subject: [REDACTED]

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This is in response to your request dated June 8, 1999 in which you requested our assistance in drafting language to be inserted into Forms 872 to be used in the above captioned case.

FACTS

It is our understanding that the facts of this case are as follows:

There is currently a CEP audit being performed on [REDACTED] for the [REDACTED] and [REDACTED] tax years and for [REDACTED]) for taxable years ending July 31, [REDACTED] and July 31, [REDACTED]. [REDACTED] is a 1120 corporation and [REDACTED] was an 1120 corporation until [REDACTED] and thereafter became an 1120S corporation for the tax period from [REDACTED] until [REDACTED]. It is our understanding from your memorandum that [REDACTED] S Corp. is not subject to TEFRA rules since it fits within the small business exception. Temp. Treas. Reg. § 301.6241-1T(c)(2) (repealed for tax years beginning after December 31, 1996).

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The Service had previously made adjustments to claimed investment credit and depreciation for the [REDACTED] and [REDACTED] tax years on these two corporations. The Service increased the basis of the [REDACTED] property assets and changed the depreciation method from ACRS to MACRS, which extends the asset life from 5 to 7 years. This case is being handled by Trial Attorney [REDACTED] of the [REDACTED].

In [REDACTED] of [REDACTED], [REDACTED] and [REDACTED] formed [REDACTED] and transferred the [REDACTED] franchises to which the depreciation deductions relate to this partnership, which then transferred them to another partnership, [REDACTED]. [REDACTED] is [REDACTED] owned by [REDACTED]. The partnership agreement for [REDACTED] provides that the depreciation adjustments on the [REDACTED] franchise assets will flow through to the [REDACTED]. Therefore these adjustments will have no tax effect on the other [REDACTED] partners of [REDACTED]. Both [REDACTED] and [REDACTED] are TEFRA partnerships.

If the Service is successful in its position regarding the issues of investment credit and depreciation in the earlier years, there will be adjustments in the [REDACTED] and [REDACTED] tax years in the taxpayers' favor. These adjustments will be made at the [REDACTED] level and will flow through the [REDACTED] to the corporations, [REDACTED] and [REDACTED]. Additionally, as to [REDACTED]'s first year as an S corporation, the adjustments will flow through to the shareholders of the S corporation.

Both [REDACTED] and [REDACTED] wish to ensure that the statute of limitations will be open for them to file amended returns, if needed, in order to claim the additional depreciation deductions. You have requested our assistance in drafting language to be inserted into Forms 872 for this purpose.

ANALYSIS

Pursuant to I.R.C. § 6229(b)(1)(A), partners in a TEFRA partnership can extend their own period of limitations for the assessment of the partnership and affected items, however, specific language is required by § 6229(b)(3). In most cases, we do not encourage obtaining consents at the partner level because of the potential tracking problems that may arise. For administrative purposes, it is simpler to manage one uniform expiration date at the .

partnership level than to manage numerous individual expiration dates. In the instance case, however, since the statute is being extended to benefit the taxpayers, we do not object to your use of the consent at the partner level.

In the instant case, you wish to have the two partners in [REDACTED] (the tier partnership) extend their own statutes as to adjustments being made to the [REDACTED] (the source partnership). Pursuant to § 6231(a)(2)(B), which states that a "partner" of a partnership is any person in a partnership whose income tax liability is determined in whole or in part by taking into account directly or indirectly partnership items of the partnership, the partners in a tier partnership are deemed to be indirect partners in a source partnership. In this case, the tax liability of [REDACTED] and of [REDACTED] is determined by taking into account (indirectly through the [REDACTED]) the partnership items of [REDACTED]. Therefore, [REDACTED] and [REDACTED] are deemed to be indirect partners in [REDACTED], and as such may agree to consent to extend the statute of limitations as to partnership items which are adjusted at the level of [REDACTED].

Since [REDACTED] S Corp. is not a TEFRA entity, consents must be obtained at the shareholder level for adjustments relating to this S corporation. However, we have been advised by your office that it is your practice to also obtain a protective Form 872 from [REDACTED] S Corp. in case it is determined that this corporation is not an S corporation.

Separate Forms 872 are to be executed by [REDACTED] for the tax year [REDACTED] and by [REDACTED] for the tax period ending July 31, [REDACTED], and by [REDACTED] S Corp. for the tax period ending December 31, [REDACTED]. Further, Forms 872 must be executed by each of the shareholders of [REDACTED] S Corp. for the tax year ending December 31, [REDACTED]. The appropriate language to be used in these Forms 872 is as follows:

Without otherwise limiting the applicability of this agreement, this agreement also extends the period of limitations for assessing any tax (including additions to tax and interest attributable to any partnership items (see section 6231(a)(3)), affected items (see section 6231(a)(5)) computational adjustments (see section 6231(a)(6)) and partnership items converted to nonpartnership items (see section 6231(b)). This agreement extends the period for filing a petition for adjustment under section 6228(b) but only if a timely request for administrative adjustment is filed under section 6227. For partnership items which have

converted to nonpartnership items, this agreement extends the period for filing a suit for credit or refund under section 6532, but only if a timely claim for refund is filed for such items. In accordance with paragraph (1) above, an assessment attributable to any partnership item shall not terminate this agreement for other partnerships or for items not attributable to a partnership. Similarly, an assessment not attributable to a partnership shall not terminate this agreement for items attributable to a partnership.

If you wish to use a Form 872-A, the following additional language must be used:

The issuance of a notice of deficiency will not terminate this agreement under paragraphs (1) and/or (2) for the items described by this paragraph.

Before inserting the above language into the agreements to be executed by [REDACTED] and [REDACTED], you may preface the suggested language with the following paragraph:

Regarding items from the [REDACTED]
[REDACTED] which flow through to the [REDACTED]
[REDACTED]:

Before inserting the suggested language into the agreements to be executed by the shareholders in [REDACTED] S Corp., you may preface the suggested language with the following paragraph:

Regarding partnership items from the [REDACTED]
[REDACTED] which flow through the [REDACTED]
[REDACTED] to the [REDACTED] S corp for the
taxable year ending December 31, [REDACTED]

Although the above language does not specifically state that the agreement extends the time for a partner to file an administrative adjustment request, section 6227(b) provides that the period prescribed for filing an administrative adjustment request shall be extended for the period within which an assessment may be made pursuant to an agreement (or any extension thereof) under section 6229(b) and for 6 months thereafter.

This opinion is based upon the facts set forth herein. You should be aware that, under routine procedures which have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modifications to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office. In the meantime, the conclusions reached in this opinion

should be considered to be only preliminary.

If you have any additional questions, please contact Rosemarie Dever Camacho at (516) 688-1701.

DONALD SCHWARTZ
District Counsel

By: _____
ROSEMARIE DEVER CAMACHO
Attorney